APPELLANT PRO SE:

DAVID W. BRANKLE
Ray Brook, New York

IN THE
COURT OF APPEALS OF INDIANA

DAVID W. BRANKLE,		
Appellant-Plaintiff,	)	
vs.	)	No. 42A01-0612-CV-532
KIMBERLY K. BRANKLE,	)	
Appellee-Respondent.	)	

APPEAL FROM THE KNOX CIRCUIT COURT
The Honorable Sherry L. Biddinger Gregg, Judge
Cause No. 42C01-0401-DR-10

June 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

David W. Brankle appeals, pro se, from the trial court's denial of his request to participate in absentia in a scheduled hearing on his request for visitation and the trial court's subsequent denial of "all pending motions." For our review, David raises several issues relating to his motions for visitation and the division of property following the granting of his wife's petition for dissolution of marriage. Concluding the trial court did not abuse its discretion by denying the motions, we affirm.

Facts and Procedural History

David and Kimberly Brankle were married on July 24, 1994. They have one son. On December 30, 2003, David was arrested and charged with multiple counts of bank robbery. On January 8, 2004, Kimberly filed for dissolution of marriage, and on April 19, 2004, the marriage was dissolved. At the time, David was incarcerated. The son was placed in the custody of Kimberly. No order for visitation or support was made, due to David's incarceration. The court noted the matters would be addressed at the request of either party. Further, the court noted that the property of the parties had been previously divided, and awarded each party the property in his or her possession.

Two years later, on April 19, 2006, David filed his "Motion for Court Ordered Visitation and Communication Between Petitioner and Child." The court scheduled this motion for hearing on July 17, 2006. On June 5, 2006, David filed a pro se "Motion for Participation in Absentia" requesting that the court arrange for his participation by video conference or by telephone, due to his incarceration in the state of New York.

On June 8, 2006, the court denied the "Motion for Participation in Absentia," stating that the court is not equipped for David's appearance by electronic or telephonic means. The court then vacated the hearing previously set on the motion for court ordered visitation, and stated the matter would be reset for hearing upon notification to the court that David is capable of appearing in court to be heard on his motion.

On June 12, 2006, David filed his "Motion for An Accounting of the Marital Property." Thereafter, on June 27, 2006, David filed a "Motion for Recusal," requesting that another judge be assigned. He also filed, on June 27, 2006, a "Motion for Reconsideration and for the Appointment of a Guardian-Ad-Litem," requesting the court to schedule a hearing with appropriate accommodation by telephone for his participation and ordering the appointment of a guardian ad litem. On September 19, 2006, David filed a "Motion For Relief Pursuant To Rules 53.1 and 73 of the Indiana Rules of Court." In that motion, he requested the court to craft a process to address the issues raised in his previous motions.

On October 16, 2006, the trial court denied all of the motions in its "Court Order On All Pending Motions." The order sets out that it denied the motion for participation in absentia due to the court not having the technology necessary to grant the request. Appellant's Appendix at A-5.[1] The order denied the motion for an accounting of the marital property "as any time for disputing the Court's Order has long passed." Id. David now appeals.

[1] We note David did not include a Statement of Facts or a copy of the appealed trial court order in his Appellant's Brief, and did not correctly paginate his Appendix. Thus, we direct David's attention to Indiana Appellate Rules 46(A) and 51(C) regarding the proper handling of these matters.

Discussion and Decision

I. Hearing on Motion for Court Ordered Visitation

David asserts the trial court abused its discretion by refusing him "reasonable accommodations to conduct an evidentiary hearing" on his motions regarding visitation. He asserts he made arrangements with the prison to allow him to appear by video-conference and requested that the trial court arrange for his participation electronically.

David has a right to request visitation and have a hearing on that request. Ind. Code § 31-17-4-1. However, he does not have the right to be present. He may seek to submit the case through documentary evidence, to conduct the trial by telephonic conference, to secure someone else to represent him at trial, or to postpone the trial until his release from incarceration. See Niksich v. Cotton, 810 N.E.2d 1003, 1008 (Ind. 2004), cert. denied, 125 S.Ct. 1073 (2005) (citing Hill v. Duckworth, 679 N.E.2d 938, 940 n.1 (Ind. Ct. App. 1997)). The trial court has wide discretion in selecting any of these options. Id. The decision as to how the hearing should be conducted is for the trial court. See Murfitt v. Murfitt, 809 N.E.2d 332, 335 (Ind. Ct. App. 2004).

David's motion for participation in absentia was denied in June of 2006. The court noted the matter would be reset for hearing upon notification that David is capable of appearing in court to be heard on his motion, because the court was unable to conduct it by telephonic means and David failed to appear and failed to request to submit his case through documentary evidence. Under these circumstances, the court did not abuse its discretion.

David's motions in this case only requested an appearance by video or telephone conference. We note that a speaker-phone, which we presume is available to most modern

judicial benches, would facilitate such an appearance. The law provides four alternatives for his appearance at such a hearing. See Niksich, 810 N.E.2d at 1008. Where the court denies a motion for participation in absentia based on a lack of technology enabling an appearance by telephone conference, the court is effectively limiting the plaintiff's options from four to three. We encourage the trial court to consider the reasonably available technology because failure to do so could ultimately raise other issues.

As the dissolution court stated the matter would be addressed at the party's request, David may seek visitation and again request to participate in absentia. David would then bear the burden of showing that his participation in absentia is the only effective manner for his participation. David would have the burden of distinguishing which of the four alternatives for his appearance are possible given his status as an inmate. It seems clear his out-of-state incarceration would render him unable to personally attend a scheduled hearing and he may be without means to appear by counsel. This leaves open an appearance through telephonic conference or submission through documentary evidence.

II. Division of Property

In the Dissolution Decree, the court stated that "[t]he property of the parties has previously been divided. The Petitioner shall be awarded property in her possession and the Respondent shall be awarded property in his possession." Appellant's App. at 24-25.

The "Court Order On All Pending Motions" addresses David's "Motion for An Accounting of the Marital Property Distributed As A Result of the Divorce Decree." The court denied David's motion, noting "any time for disputing the Court's Order has long passed." David charges the trial court abused its discretion by refusing to hear his motion

regarding the division of marital property. However, David's motion is an attempt to present his complaint that the trial court abused its discretion in dividing the marital property and to extend the deadline to file an appeal he should have filed after the division of property in 2004. We will not allow him to do indirectly what he can no longer do directly. The trial court properly denied the motions.

Conclusion

Concluding the trial court did not abuse its discretion in denying the motions, but noting David may in the future file a request for visitation and seek to participate in absentia, we affirm.

Affirmed.

SULLIVAN, J., and VAIDIK, J., concur.